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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEFFREY BERK, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

COINBASE, INC., a Delaware Corporation d/b/a Global Digital Asset Exchange ("GDAX"), Brian Armstrong and David Farmer,

Defendants.

Case No.: 3:18-cv-01364-VC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO STAY

Date: August 9, 2018
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria

Courtroom: 4 - 17th Floor

Date Filed: March 1, 2018

Trial Date: None set

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I. INTRODUCTION AND RELEVANT FACTS

Plaintiff Jeffery Berk ("Plaintiff") submits this Memorandum of Points and Authorities in opposition to Defendants' Motion to Compel Individual Arbitration and to Stay ("Motion to Compel").[1] This action arises from the manipulation of the market for the cryptocurrency bitcoin cash ("BCH") by Coinbase, Inc., among others, in relation to its undeniably disastrous launch on the Coinbase exchange (the "Launch"). Contrary to Coinbase's assertions that all of its alleged wrongdoing (and that of its two executives, Armstrong and Farmer), falls within the arbitration agreement ("Arbitration Agreement") contained in its User Agreement ("User Agreement")—it does not and is not subject to arbitration.[2]

This Action asserts the following:

(1) That prior to Coinbase's ill-advised Launch of BCH, both Armstrong and Farmer made misrepresentations and omissions regarding whether and when Coinbase would support BCH, misleading customers and investors;

(2) That Coinbase and Armstrong then tipped their employees as to when Coinbase was going to launch BCH over a month before the Launch and any public announcement of the Launch date, and then failed to enforce rules preventing their employees or other insiders from misappropriating that confidential information to engage in extensive pre-launch trading on other exchanges, only a few days before the Launch, resulting in the run up and artificial inflation of the price of BCH just days before the Launch was publicly announced, *See* Roedell Dec., Ex A[3], Comp.¶63-64;

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[1] Plaintiff concurrently submits the Declaration of Robert Green (the "Green Declaration", or "Green Dec., at Ex. __"), and the exhibits thereto, which include the Declaration of Jeffrey Berk (the "Berk Declaration"), and the Declaration of Matthew Roedell (the "Roedell Declaration", "Roedell Dec., Ex. __", and the exhibits thereto.

[2] At this juncture, Plaintiff concedes that he clicked a box at the inception of his service with Coinbase that hyperlinked to the User Agreement and Privacy Agreement. *See* Motion to Compel at 2-4. He does not concede that he agreed to the American Arbitration Association ("AAA") Rules, which were "hyperlinked to the Arbitration Agreement and pages away from the click button, and the delegation clause that was nested within the 40 page AAA Rules.

[3] On a motion to compel arbitration, a court may consider matters outside the pleadings, and the motion is treated like one for summary judgment under Fed. Rule of Civ. Pro., 56. *Regents of*

(3) That the launch of BCH was disastrous due to this pre-announcement trading, which led to the price of BCH skyrocketing in a matter of minutes, from about $3,500 to about $9,500 per BCH, *See* Roedell Dec., Ex. C, Comp. ¶53, leading to the halt sales of BCH at these inflated prices, but Coinbase's continued recognition of purchases at artificially inflated prices, generating fees;

(4) That Coinbase halted and cancelled trading, after two minutes[4]; leaving Coinbase customers with the inability to get their money or coins out of Coinbase; and

(5) That BCH opened the next day at about $3,500, almost $6,000 less per BCH than the run up the day before due in part to trading by insiders. Roedell Dec., Ex. B.

Given the unprecedented run up of the price of BCH before the launch, Armstrong himself publicly admitted that there might have been insider trading, and that Coinbase was commencing an investigation, but then did nothing thereafter. Comp.¶¶63-67. Rather, than take action consistent with their own rules, however, Defendants then falsely eradicated the artificial price spike that they had created on December 19th, in an effort to sweep the entire manipulation scheme, and their own negligence under the proverbial rug, but locked in massive losses for customers. *See* Roedell Dec., Ex. B. They also changed the priority rules governing the GDAX, the exchange run by Coinbase, and the "back room" for its Coinbase retail customers, in mid stream from requiring priority trading to eliminating that provision. Green Decl., Ex. A.

The reasoning for this is obvious--to save Coinbase's own skin in this effective run on the Company. As a currency dealer and exchange[5], with the onslaught of sales due to the price run up, Coinbase would have had to pay out exorbitant amounts of money to make these purchases at the highly inflated prices. With an avalanche of purchases at inflated prices from outside investors, it is likely that it would have had to sell far more BTH than it had. To avoid

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the Univ. of Cal. v. Japan Sci. & Tech. Agency, 2014 U.S. Dist. LEXIS 199896, *6, n. 24 (C.D. Cal. Oct. 16, 2014). The Court should view all evidence in favor of the non-moving party to determine whether a valid arbitration agreement exists. *Ziglar v. Express Messenger Sys.*, 2017 U.S. Dist. LEXIS 220460, *6 (D. Ariz. Aug. 31, 2017).

[4] Significantly, Coinbase continued to record purchases of BCH, after terminating all sales for lack of liquidity leaving Class members with no exit, and for many, stuck with overpriced, and artificially inflated BCH and the conversion of their property by Coinbase. Comp., ¶¶58-62.

[5] Coinbase has recently sought registration as a broker and has purchased several broker dealers. *See* Green Dec., Ex. B. There is little question that the GDAX is an exchange. Comp.¶6.

this run, it allowed two minutes of trading, enabling dumping at inflated prices by its own insiders, and then shut down selling (but still took purchase orders and then filled them at inflated prices, and ignored limit orders) until it completely shut down trading.[6] It then opened for trading the next day but at prices of about $3,000 less than the inflated price to which BCH has been run the prior day to be consistent with other exchanges. In the meantime, it filled purchase orders at the artificially inflated prices, earning fees.[7]

This is not a simple case of a "conversion" issue that falls neatly within the limited scope of Coinbase's User Agreement, and thus under the "narrow" scope of the arbitration clause, as Defendants contend.[8] It is a manipulation of the Launch and market for BCH. Neither deceptive practices, manipulation or even the negligence alleged here are claims "arising under" the narrow scope of the Arbitration Agreement. However, it is scheme that at a minimum violates California's Unfair Competition Law ("UCL") and resulted from intentional conduct or, alternatively, negligence, and may be violative of the Commodities Exchange Act.[9] In short, it is an Action rightfully belonging in this Court.[10]

It is up to this Court to decide the "gateway issues" of whether there is an agreement to arbitrate, and the scope of that agreement ---not an arbitrator. Defendants argue that the incorporation of the AAA Rules constitute a clear and unmistakable intent by the parties that these gateway issues be determined in arbitration. But the Ninth Circuit has explicitly left open

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[6] Although Defendants argue that Class members could have cancelled their trades, that is not correct. First, the cancellation button did not work. S*ee* Roedell Declaration. Second, Class members had every expectation that their orders would be filled at the market price quoted to them and therefore had insufficient information to cancel their purchases. *See* Berk Declaration.

[7] Notably, Coinbase also engages in proprietary trading on GDAX. Whether it traded during the Launch is an issue to be determined during discovery. *See* GDAX Rules at 3.4.

[8] The Arbitration Clause here falls into what courts deem the "narrow" scope: it provides that only disputes with Coinbase "arising under this Agreement" or the User Agreement are subject to arbitration. *See* Point II, *infra*.

[9] BCH and all cryptocurrencies are commodities regulated by the CFTC.

[10] The User Agreement, moreover, specifically acknowledges that customers will bringing tort claims in Section 8.3, entitled Limitation of Liability, and does not provide that such claims be arbitrated. *See* Declaration of Jesse Pollack in Support of Motion to Compel Individual Arbitration and to Stay ("Pollack Dec.") Ex. 4 at p.12. Further, Defendants admit in the Motion to Dismiss, that the issue of the scope of their duties under negligence claims is one to be decided by a court—not an arbitrator. *See Motion to Dismiss* at 9 (citing *Melton v. Boustred*, 198 Cal. App. 4th 521, 531 (2010) for the proposition that "[t]he existence of a duty is a question of law for the court.").

the issue of whether such an incorporation applies in the current circumstance—a consumer contract of adhesion where there has been no opportunity for negotiation or to opt out, and where the customer is not a sophisticated business person. More importantly, the Arbitration Agreement specifically reserves those issues for the Court, in direct contravention to the AAA Rules and thus to the delegation to the arbitrator of its right to determine its own jurisdiction. The Arbitration Agreement states that, "[i]f a court decides that any provision of this section 7.2 is invalid or unenforceable, that provision shall be severed and the other parts of this section 7.2 shall still apply." The court must determine in the first instance, the enforceability of the Arbitration Agreement. The "delegation provision" or the reference to the AAA rules conflicts with the Arbitration Agreement making any delegation ambiguous at best. It therefore must be construed against Coinbase—the drafter. It is certainly not clear and unmistakable.[11]

The delegation agreement was never agreed to. The User Agreement was merely hyperlinked. Defts. Br. at 2-4. The User Agreement is 30 pages long. *See* Pollack Dec., Ex. 4. At page 10, the User Agreement, in a section regarding Customer Disputes that was not referenced at the "click" stage[12], is yet another hyperlink to the AAA Rules, which are over 44 pages. At page17 of those rules is one paragraph regarding the delegation. It is difficult to believe that a consumer by clicking a button at the opening page has formed consent to a provision that is nested over 30 pages and two hyperlinks away from the opening account page.

In any event, the Arbitration Agreement suffers from both procedural and substantive unconscionability under California law, and cannot be enforced. This case involves a consumer contract of adhesion that was offered on a take it or leave it basis. There was no negotiation and

[11] In the Motion to Dismiss at note 1 and pages 14-15, Defendants ask that even if there is no delegation of the arbitration issues, the class action allegations be stricken from the Complaint. Defendants have not made a motion to strike, nor do they provide any reason why such provisions should be stricken. Moreover, courts in this jurisdiction have held that striking class action provisions at the early stages of a litigation are premature. *See, e.g., In re Nexus 6P Products Liability Litig.*, 2018 U.S. Dist. LEXIS 35739 (N.D. Cal. Mar. 5, 2018). *Eshagh v. Terminix Int'l Co., L.P.*, 588 Fed. Appx. 703 (9th Cir. 2014), cited by Defendants at page 15, merely allows that where court compels arbitration, the class allegation should be stricken. It does not concern the issue of striking class actions where the court retains jurisdiction to determine arbitrability and may well find that the claims are not arbitrable. In that case, the Court must assuredly should not strike the class action allegations.

[12] Nowhere at the "click" stage does it indicate that the customer is both agreeing to arbitration, a class action waiver, and delegation of the issue of arbitrability to the arbitrator.

no ability to opt out to use the site.[13] Those facts alone give rise to a degree of procedural unconscionability. And the scale is tipped in favor of striking it given the substantive unconscionability of a fee shifting provision that imposes upon any customer the attorneys' fee and expenses incurred by Coinbase in any proceeding to enforce the Arbitration Agreement against any non-prevailing party. Any customer filing a court action, who is then subject to a successful motion to compel and subsequently loses the arbitration, may be liable for arbitration fees, and for hundreds of thousands of dollars in legal fees incurred by the defendants in compelling arbitration. Such a provision, despite being nominally bi-lateral, was intended to have an *in terrorem* effect, and to discourage any customer from challenging the Arbitration Agreement. This fee shifting provision conflicts with other provisions of the Arbitration Agreement that specifically state that in an arbitration, the parties shall be liable for their own costs and attorneys' fees. This fee shifting provision, makes the Arbitration Agreement sufficiently riddled with unconscionable provisions and should not be enforced.[14] It imposes fees on a customer in excess of those allowable in arbitration.[15]

Neither of the Individual Defendants are signatories to the Arbitration Agreement and do not have standing to make this motion. They are alleged to have made negligent misrepresentations concerning Coinbase's launch of BCH, and to have acted negligently during the Launch. There is a separate basis for their liability arising under state law, that is imposed upon them apart from their agency with Coinbase. As non-signatories sued under state law, the claims against them do not fall within the narrow scope of the Arbitration Agreement. The claims against the individuals must remain in this Court, even if the Court determines to compel arbitration of the Coinbase claims. No stay should be issued if those claims remain here.

[13] Defendants argue that other sites were supporting BCH. However, those sites were not nearly as large as Coinbase, and did not offer the liquidity available on Coinbase. Comp.¶6, 8.
[14] Alternatively, the Court can strike the fee shifting provision from the Arbitration Agreement and not enforce it if the Action is then sent to arbitration, and Plaintiff loses.
[15] The Arbitration Agreement provides that the Company will reimburse the customer for costs beyond those he would have incurred in a court proceeding in arbitration. *See* Arbitration. Agreement, Section 7.2.

II. ARGUMENT

A. This Court has Jurisdiction to Determine the Enforceability of the Arbitration Agreement

There is a strong and long-standing presumption that courts, not arbitrators, determine the threshold questions of arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, *924 (1995)("*First Options*"); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013)("*Oracle*"). Thus, a provision delegating those questions to an arbitrator is enforceable only if it "clear and unmistakable". *Brennan v. Opus Bank*, 796 F.3d 1126 (9th Cir. 2015)("*Brennan*"). In making that determination, courts are to exercise caution, and should require a higher showing of intent. *Id.*, citing *First Options*, 514 U.S. at 44. Unless there is clear and unmistakable evidence that the parties agreed to arbitrate abitrability, the usual presumption that exists in favor of arbitration is replaced by a presumption against it. *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, *13-14 (9th Cir. 2011)("*Cape Flattery*"). In deciding whether the parties have agreed to arbitrate, courts should apply ordinary state law principles that govern the formation of contracts. *Levi Strauss & Co. v. Aqua Dynamics Sys.*, 2016 U.S. Dist. LEXIS 46738, *20 (N.D. Cal. April 6, 2016)("*Levi Strauss*"); *First Options*, 514 U.S. at 944.

Defendants argue that incorporation of the AAA Rules into the User Agreement constitutes clear and unmistakable evidence that the parties agreed to delegate the "gateway" questions of arbitrability to an arbitrator. First, the Arbitration Agreement does not unmistakably delegate such issues to the arbitrator. In fact, the opposite is true. It leaves issues of enforceability and the validity of the Arbitration Agreement in the jurisdiction of the Court.

As stated above, the severability provision, found in the Arbitration Agreement, specifically states, "[i]f a court decides that any provision of this section 7.2 is invalid or unenforceable, that provision shall be severed and the other parts of this section 7.2 shall still apply." Section 7.2 is the Arbitration Agreement. Reference to the AAA Rules cannot be viewed in a vacuum, as Defendants would have this Court do. *Levi Strauss*, 2016 U.S. Dist. LEXIS at *21-22. Rather, the arbitration agreement must be viewed holistically. *Id.* Where an arbitration agreement contains a reference to AAA Rules and a severability provision, courts

have found that the agreement fails to evince a clear delegation of arbitrability. *Levi Strauss*, 2016 U.S. Dist. LEXIS at *23-24; *Vargas v. Delivery Outsourcing, LLC*, 2016 U.S. LEXIS 32634, *17-18 (N.D. Cal. Mar. 14, 2016)("Vargas"); *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1565-66 (2009); *Baker v. Osborne Dev. Corp.*, 159 Cal. App. 4th 884, 891 (2008); *Ajamian v. CantorCo2e, L.P.*, 203 Cal. App. 4th 771, 792 (2012). In those instances, ambiguity is resolved in favor of court adjudication. *Vargas*, 2016 U.S. Dist. LEXIS at *16-17, citing *First Options*, 514 U.S. at 944-45. Thus, there is no question here that the Court is to determine the "gateway" issues.[16]

The Ninth Circuit has not explicitly held that incorporation of the AAA Rules in consumer agreements involving unsophisticated parties constitutes clear and unmistakable evidence of delegation. Defendants argue that the weight of authority since the Ninth Circuit's rulings in *Brennan* and *Oracle*, support such an outcome. Both *Brennan* and *Oracle* limited their holdings to their facts—which did not involve unsophisticated consumers. Even after *Brennan* and *Oracle*, some courts in this jurisdiction have found that mere incorporation of the AAA Rules into a consumer contract of adhesion is insufficient to demonstrate a clear and unmistakable intent to delegate. *See Ingalls v. Spotify USA, Inc.*, 2016 U.S. Dist. LEXIS 157384 (N.D. Cal. Nov. 14, 2016) and the cases cited therein. *Accord Tompkins v. 23andMe, Inc.*, 2014 U.S. Dist. LEXIS 88068, *41 (N.D. Cal. June 25, 2014)(noting that the holding in *Oracle* was limited, and for good reason).

None of the cases cited by Defendants involve the situation here, where the arbitration clause contains a severability clause leaving the issue of its enforceability and validity to the court. *See, e.g., McLellan v. Fitbit, Inc.*, 2017 U.S. Dist. LEXIS 168370, *12-13 (N.D. Cal. Oct. 11, 2017)(severability clause contained in general terms pertaining to entire terms of service, not just to arbitration agreement); *Cordas v. Uber Tech., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017)(no discussion about severability agreement); *Zelkind v. Flywheel Networks, Inc.*, 2015 U.S. Dist. LEXIS 141367, *8-11 (N.D. Cal. Oct. 16, 2015)(no discussion of

[16] Notably, the Defendants' counsel lost this very issue under similar circumstances in an earlier case. *See Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930 (N.D. Cal. 2015).

severability clause); *Rodgriguez v. Am. Techs., Inc*., 136 Cal. App. 4th 1110, 1123 (2006)(no discussion of severability clause); *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 557 (2004)(same); *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413, 1442 (2010)(same).

B. This Dispute Does not Fall within the Narrow Scope of the Arbitration Agreement

Arbitration is a matter of contract, and a party "cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Tracer Research Corp. v. Nat'l. Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994)("*Tracer*"); citing *United Steelworkers v. Warrior & Guild Navigation Co.*, 363 U.S. 574, 582 (1960); *Henson v. United States Dist. Of N. Cal.*, 869 F.3d 1052, 1059 (9th Cir. 2017). State law holds the same. *See E Fund Capital Partners v. Pless*, 150 Cal. App. 4th 1311, 1320-21 (2007) and cases cited therein ("[t]here is no public policy requiring persons to arbitrate disputes that have not agreed to arbitrate."). Statutory rules of construction apply in determining the scope of the arbitration provision, and the clear provisions of the contract are given their ordinary meaning. *Waller v. Trust Ins. Exchange, Inc*., 11 Cal. 4th 1 (1995).

In determining whether a particular dispute falls within the purview of an arbitration agreement, courts consider whether the language of the arbitration provision is "broad" or "narrow". An arbitration provision that covers claims "arising under" *and* "relating to" the agreement are considered broad in scope and cover not only contract claims but tort claims arising from the contract. *Tracer*, 42 F. 3d at *1295, *Mediterranean Enterprises, Inc. v. Ssangyong Corp*., 708 F.2d 1458, *1463-64 (9th Cir. 1983)("*Mediterranean*").

Provisions that are limited to disputes "arising under" an agreement, as here, however, have been held to be "narrow" and cover solely those claims that relate to the interpretation and performance of the contract itself. *Tracer*, 42 F.3d at *1295; *Mediterranean*, 708 F.2d at *1464. *See also Cape Flattery*, 647 F. 3d at *921 (reaffirming the holdings of *Tracer* and *Mediterranean* that the term "arising under" relates to contract interpretation and performance); *Rice v. Downs*, 248 Cal. App. 4th 175, 187, 190 (2016)("*Rice*") (noting that tort claims are only included in broadly worded provisions). Any argument that the cause of action would not exist

"but for" the agreement is insufficient to establish that it falls within the confines of a narrow arbitration agreement). *Cape Flattery*, 647 F.3d at 922.

Coinbase undeniably has a "narrow" arbitration agreement, which provides that only disputes "arising under" the User Agreement or contract claims, are arbitrable. That means that only *disputes with Coinbase* involving "the interpretation and performance of the contract itself" are covered by the arbitration clause. *See Tracer*, at *1295, citing *Mediterranean*, at *1464. Tort claims and claims that arise under an independent statute or state common law, such as those asserted here unequivocally do not fall within that category. *Leidel v. Coinbase, Inc.*, 2018 U.S. App. LEXIS 10464, *11-12 (11th Cir. Apr. 23, 2018)("*Leidel*")(discussing Coinbase's arbitration agreement, under Florida law, and finding that its narrow scope only covers claims that have a direct relationship to the agreement. Also noting that to some extent Florida and California law are the same).[17]

In fact, that was one of issues in *Leidel*, a decision in which the Eleventh Circuit refused to order arbitration of tort claims including breach of fiduciary duty and negligence. In *Leidel*, both a receiver of Crypsty, Inc. ("Crypsty"), and the named plaintiff, Leidel, as a representative of a class of customers of Cryptsty, sued Coinbase for its failure to monitor the illegal activity of Crypsty and its principal, who had agreements with Coinbase and had used Coinbase to clear their trades. In holding that the claims brought by Leidel and class members were not subject to the arbitration provision, the Eleventh Circuit explained that given the narrow scope of the arbitration provision, Coinbase was required to show that Leidel's claims had "direct relationship to [the User Agreement] terms and provisions." *Id*. at *11-12. The court held that Coinbase's duties arose out of the regulatory scheme under which it operated, as a money transmitter, rather than the agreement, and denied Coinbase's motion to compel arbitration. *Id*.

[17] The Eleventh Circuit further explained that even a broad arbitration agreement would not necessarily cover claims merely because the parties in issue have a contractual relationship. *Id*. at *8-9. Rather, there must be a significant relationship between the claim and the contract, such that the "claims present circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract." *Id*. citing *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013).

at *11. Significantly, Leidel did not assert claims under any money transmission act, but rather that Coinbase had breached a fiduciary duty owed to class members and had acted negligently.[18]

The claims here assert a manipulation scheme consisting of: insider trading and tipping, a failure to monitor employees, misleading statements concerning Coinbase's launch of BCH, and sales of BCH at manipulated prices for fees, and the termination of trading—all of which are brought under a state statutory cause of action governing Coinbase's operations—California's Unfair Competition Law. That law prohibits unfair business practices.

Alternatively, the Complaint alleges negligence in Coinbase's handling of the Launch. These are state law claims that do not have a direct relationship to the User Agreement.[19]

Defendants do not address any of these issues. Rather, they make the broad brushed argument that Plaintiff's claims "revolve" around Coinbase's Conversion services. Defts. Br. at 12. This broad reading is insufficient to bring Plaintiff's state law claims into the narrow scope of the Arbitration Agreement nor do they derive from an interpretation or performance of the Agreement. Coinbase's conversion services cannot possibly include illegal conduct including the sale of a cryptocurrency, here BCH, at artificial and manipulated prices, caused by its own employees, and the effective conversion of customer's monies or BCH until the following day, when the price of BCH plummeted to about $3,500 per coin.[20] It does give Coinbase the right

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[18] Leidel was not a signatory to the arbitration agreement. *Id*. at *6-7.

[19] Should the Court find the delegation valid, it should then find that the assertion of arbitrability is "wholly groundless". *See, e.g., Qualcomm Inc. v. Nokia Corp.*, 466 F. 3d 1366, 1371 (Fed. Cir. 2006)("*Qualcomm*"); *Baysand Inc. v. Toshiba Corp.*, 2015 U.S. Dist. LEXIS 157442, *7 (N.D. Cal. Nov. 19, 2015). In undertaking that analysis, the Court must look at the "arbitration clause and the precise issues that the moving party asserts are subject to arbitration" to determine whether the assertion of arbitrability is "wholly groundless". *Qualcomm*, at *1374. As the above asserts, the claims here do not fall within the arbitration clause's purview, even under the "wholly groundless" standard.

[20] In the accompanying Motion to Dismiss, Defendants argue that no insider trading took place because Coinbase's employees did not trade until Coinbase announced the Launch. Motion to Dismiss at 6-7. That is not the issue nor is that accurate. As Roedell Dec., Ex. A demonstrates, there was a run up of the price and trading of BCH several days before the Launch and early during the Launch, that was clearly due to Coinbase insiders purchasing BCH on other exchanges, in order to dump their cheaply purchased BCH for artificial prices on Coinbase. Comp. at ¶12, 14, 48, 55-56, 58, 64-65. After effectively pumping up the price pre-Launch, they dumped their shares at the Launch at the same time that the unsuspecting investing public tried to either purchase at lower prices or sell their shares. *Id*. These employees misappropriated Coinbase's non public information, which they obtained through their confidential relationship with Coinbase. Coinbase then executed the trades at artificially manipulated prices, for which it

to manipulate the market for a currency and to convert the coins or monies of its customers in order to avoid a run. These claims arise out of duties created by law—not the contract, and Plaintiff does not rely upon the contract to plead his claims. The Ninth Circuit held that claims brought under the UCL based upon deceptive acts and practices, that do not rely upon a contract containing an arbitration clause, are not arbitrable. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1130 (9th Cir. 2013). This illegal conduct does not even relate peripherally to the agreement at issue. *Cape Flattery*, at 917 (claims that touch only peripherally to an agreement are not arbitrable under a narrow provision).[21]

Moreover, the Complaint seeks restitution and disgorgement of Coinbase's profits under the UCL, that it obtained by engaging in manipulation and deceptive acts and practices—not damages under the Agreement. *See Rice*, at 193-194 (denying arbitration, in part because remedies sought were based upon state law claims, and not the contract).

Defendants further effectively argue that Plaintiff's negligence claim would not exist but for the Agreement and that Defendants' duties only arise because of the Agreement. That is not true. Defendants' duties arise because they were acting as a currency broker and exchange—not because of the Agreement. This is not an issue of what duties Coinbase owed to its customers under the Agreement. It is a matter of what duties Coinbase owed under state law. In any event, but for causation is not sufficient to support arbitration. *E Fund Capital Partners*, at 1327-28.

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obtained fees, while shutting down sales, so that it did not have to pay out to the investing public at artificially high prices. In short, Coinbase manipulated the trading market for BCH during the Launch for its own benefit, taking advantage of the insider trading of its employees. That not only states a claim under the UCL, as discussed in the accompanying Opp. to Motion to Dismiss, but could state a claim under the Commodities Exchange Act ("CEA"). *See, e.g., CFTC v. McDonnell*, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018)("*McDonnell*")(in which Judge Jack Weinstein upheld the CFTC's jurisdiction over virtual currencies, noting that bitcoin was a commodity, and issuing an injunction in an action arising from violations of the CEA in a virtual currency manipulation scheme). *Accord* S. Sullivan, Columbia Business Review, *Insider Trading in Cryptocurrency: Exploring New Territory for the CFTC*, dated April 3, 2018, found at https://cblr.columbia.edu/insider-trading-in-cryptocurrency-exploring-new-territory-for-the-cftc/. At the very least, Coinbase was negligent in the way that it handled the Launch.

[21] The GDAX Rules prohibit market manipulation by customers but say nothing about Coinbase or its employees. Section 2, *et seq*.

C. The Arbitration Agreement is Unconscionable and Should Be Stricken

The Arbitration Agreement is unconscionable under California law and should be stricken.[22] To demonstrate unconscionability, California requires a showing of procedural and substantive unconscionability. *Tompkins v. 23andMe, Inc.*, 2014 U.S. Dist. LEXIS 88068, *51-52 (N.D. Cal. June 25, 2014)("*Tompkins*") citing *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000)("*Armendariz*"). In determining whether an agreement is unconscionable, a court examines both prongs and determines whether, overall, the arbitration provision is unconscionable. *Tompkins* at *52. Unconscionability is determined on a sliding scale, and where procedural unconscionability is slight, strong evidence of substantive unconscionability will tip that scale. *Nagrampa v. MaiCoupons*, 469 F.3d 1257, 1281 (9th Cir. 2006).[23] As discussed in *Tompkins*, the unconscionability analysis begins with whether the contract is one of adhesion, as is the instant agreement. If a contract is adhesive; that is, imposed by the party of superior bargaining powers, without the possibility of negotiation and on a take or leave it basis, the next question is whether it presents some degree of oppression due to the unequal bargaining power of the parties. *Id*. at 54; *Armendariz*, at 99. Oppression arises from unequal bargaining power which results in no real negotiation. *Tompkins*, at *54.

There is no question that the Arbitration Agreement here is one of adhesion and oppression was extant. Neither Plaintiff nor any other Class member had an opportunity to negotiate it or to opt out. Moreover, no other exchanges had close to the liquidity that Coinbase has, as the largest cryptocurrency exchange in the world. Comp.¶6-8. In fact, those Class members who received BCH in the August 1, 2017 fork were especially oppressed since Coinbase refused to distribute their coins until the date of the launch—December 19, 2017—preventing them from withdrawing their BCH and selling them on another exchange—an issue that was never raised in any agreement. It was unrealistic for most retail investors to use

[22] Recent cases have held that the unconscionability defense has not been overruled by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *See, e. g., Bermudez v. PrimeLending*, 2012 U.S. Dist. LEXIS 197023, *18-19 (C.D. Cal. Aug. 14, 2012).

[23] Further, the sophistication of the parties alone cannot defeat a claim of unconscionability. *Nagrampa*, at 1283. Defendants speculate but have no facts regarding Plaintiff's sophistication.

another exchange for the BCH launch. The Arbitration Agreement was procedurally unconscionable and Coinbase customers seeking to sell their BCH, were stuck.[24]

The Arbitration Agreement is substantively unconscionable in that it contains a fee shifting provision allowing fees in any action or proceeding to enforce "this agreement". Specifically, the provision, which is found in Section 7.2, the Arbitration Agreement, states, "[t]he prevailing party in any action or proceedings to enforce this agreement shall be entitled to costs and attorneys' fees." Any Class member who seeks to challenge any portion of the Arbitration Agreement or its enforcement, as here, and is compelled to arbitration and loses, may be forced to pay the costs of arbitration and the costs of his efforts to repel the Arbitration Agreement. Customers with legitimate challenges to unconscionable provisions in arbitration agreements would be discouraged from challenging them and penalized when they did, even if successful. This provision clearly exposes the customer to far greater risk and has the intended effect of chilling a customer's right to challenge the unconscionability of the arbitration in court. In California, such fee shifting provisions have been held to be unconscionable. *See, e.g.*, *Bermudez v. PrimeLending*, 2012 U.S. Dist. LEXIS 197023, *26-27 (C.D. Cal. Aug. 14, 2012) (holding that even a bi-lateral fee shifting provision is unconscionable under California law, where it conflicts with statutes); *Bynum v. Maplebear Inc.*, 160 F. Supp. 3d 527, *537 (E.D.N.Y. 2016)(apply California law and holding that fee shifting in an arbitration agreement is unconscionable under California). Although the foregoing cases arose in the employment context, they apply here given the substantive unconscionability of the fee shifting provision. [25]

D. The Claims Against Armstrong and Farmer are not Subject to Arbitration

The claims against the Individual Defendants, Armstrong and Farmer are not subject to arbitration as they not signatories to any arbitration agreement. In determining whether an arbitration clause applies to a non-signatory, the federal policy favoring arbitration falls away

[24] Once the Launch began, and Coinbase closed down the exchange, all potential sellers were unable to obtain their coins or their money and were essentially stuck. Comp.¶57-62.

[25] At a minimum, the Court should sever and strike the provision. Under the provision, fees do not accrue until the entire action is completed and lost on the merits. *In re Cellphone Termination Fee Cases*, 2014 Cal. App. Unpub. LEXIS. 4459 (Cal. Ct. App. June 24, 2014).

and the liberal federal policy regarding the scope of arbitrable issues is inapposite. *Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, *1075 (C.D. Cal. 2007). In that instance, the burden is on the non-signatories to satisfy a two pronged standard: (1) whether the wrongful acts for which they are sued relate to their behavior as agents of the signatory to the arbitration agreement; *and* (2) whether their acts arise out of the agreement containing the arbitration agreement. *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 916 (N.D. Cal. 2010)(citing *Letizia v Prudential Bache Secur., Inc.*, 802 F.2d 1185 (9th Cir. 1986)("*Letizia*") and *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993)(acts of agents that do not arise from a contract containing an arbitration provision, are not arbitrable). *See also Amisil Holdings Ltd. v. Clarium Capital Mgmt. LLC*, 622 F. Supp. 2d 825, 835 (N.D. Cal. 2007).

Defendants argue only one prong of the test, that Armstrong and Farmer, were acting as Coinbase's agents, and thus they can compel arbitration, based upon the *Letizia* case. *Letizia* is distinguishable. It involved the arbitrability of claims against two account managers for plaintiff's account in an action against Prudential Bach, under a customer arbitration agreement. The account managers were undeniably acting solely as agents for the brokerage firm. Further, the customer agreement specifically provided for "arbitration of *any dispute arising out of or relating* to Letizia's account." *Letizia* at 1186 (emphasis added). Thus, the court, applying ordinary contract and agency principles, held those claims could be arbitrated.[26]

That is not the situation here. The claims against Armstrong and Farmer are for their negligence and negligent misrepresentation. They are individually liable for their acts, not as agents of Coinbase. *Frances T. v. Village Green Owners Assn.*, 412 Cal. 3d 490, 507-508 (1986)(officers held personally liable for their tortious conduct).

Second, even if Armstrong and Farmer were acting as agents or employees of Coinbase, they have failed to show that their wrongful conduct implicates the terms of the User

[26] *Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 418 (1985), upon which Defendants also rely, is equally inapposite. In that case, a player sued his former football team and four owners, operators and managers, admitting that they had all breached the player's contract. Given that characterization, the court found that arbitration provision in the contract applied to the non-signatory defendants. Similarly inapposite is *Boston Telecomms. Grp., Inc. v. Deloitte Touche Tohmatsu*, 249 Fed. App'x 534, 539 (9th Cir. 2007)(extending arbitration agreement to non-signatory CEO where he was alleged to have been acting as an agent under an agreement).

Agreement. Their wrongdoing constitutes independent acts of negligence and unfair business practices unrelated to any provision or interpretation of the User Agreement, and potential manipulation under the CEA. Moreover, the Arbitration Agreement applies solely to disputes arising under the User Agreement with Coinbase, and says nothing about arbitrating officer's misleading statements or their tipping of employees in advance of a launch. *See Amisil*, 622 F. Supp. 2d at *834 (discussing a narrow arbitration provision, such as the instant one, and reasoning that it would be difficult to find that claims against a non-signatory "arise under" an agreement to which he is not a party). Armstrong and Farmer have not satisfied the burden enabling non-signatories to compel arbitration.

E. No Claims Should be Stayed

Given that Armstrong's and Farmer's misconduct does not implicate the User Agreement (and thus the Arbitration Agreement), there is no basis to stay the claim against them, even if the Court orders arbitration of the Coinbase claims. Defendants argue that the Court must stay all the claims because they fall within the Arbitration Agreement, citing 9 U.S.C. §3 and *Anderson v. Pitney Bowes, Inc.*, 2005 U.S. Dist. LEXIS. 37662 (N.D. Cal. May 4, 2005)(where claims clearly falling within the pertinent arbitration agreement were stayed). Plaintiff believes that no stay is warranted, based upon the above arguments. If the Court finds that the claims against Coinbase are arbitrable but the claims against Armstrong and Farmer, are not, it is within the Court's discretion whether to stay the non arbitrable claims. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21 n. 23 (1983)(indicating that staying litigation among the non-arbitrating parties "may be advisable" but the "decision is left to the district court . . . as a matter of discretion to control its dockets."). Given the importance of regulating cryptocurrency exchanges, public policy and the need to ensure that virtual currency exchanges operate in a fair manner, Plaintiffs believe that the Court should exercise its discretion to deny any stay of the non-arbitrable claims.

III. CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the Court deny Defendants' Motion to Compel and Stay in all respects.

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